No. 88-127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

ROBERT T. GOODE, JR.,
Respondent.

BRIEF ON THE MERITS OF PETITIONER NORFOLK AND WESTERN RAILWAY COMPANY ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

EDWARD L. OAST, JR.
Counsel of Record
WILLIAM T. PRINCE
JOHN Y. RICHARDSON, JR.
JOAN F. MARTIN
WILLIAMS, WORRELL, KELLY,
GREER & FRANK, P.C.
600 Crestar Bank Building
Norfolk, Virginia 23510
804-624-2600

Attorneys for Petitioner
Norfolk and Western
Railway Company

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

I. Whether a pier machinist who repairs and maintains coal loading machinery at a maritime terminal has the status of a maritime employee under the Longshore and Harbor Workers' Compensation Act?

II. Whether a state court's adherence to its own definition of LHWCA status, contrary to uniform federal precedent, effectuates the intent of Congress to create a simple, uniform standard of coverage?

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-127

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

ROBERT T. GOODE, JR.,
Respondent.

BRIEF ON THE MERITS OF PETITIONER NORFOLK AND WESTERN RAILWAY COMPANY ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner, Norfolk and Western Railway Company,[1] respectfully prays that this Court reverse the judgment of the Supreme Court of Virginia.

REFERENCE TO OPINIONS BELOW

The order of the Supreme Court of Virginia, unreported, is reprinted in the joint appendix at

---

[1] Pursuant to Rule 28.1 Petitioner states that the prior listing of corporate affiliates in its Petition for Writ of *Certiorari* is currently accurate.

JA: 46.[2] The letter opinion of Judge Waters, Circuit Court of the City of Norfolk, in the subject case is reprinted at JA: 34.

JURISDICTION

The order of the Supreme Court of Virginia was entered on April 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). On February 21, 1989 this Court granted the Petition for a Writ of *Certiorari*. 109 S. Ct. 1116.

STATUTORY PROVISIONS

This case requires interpretation of certain provisions of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 902(3) and 905(a). The text of these subsections is reprinted at JA: 47-49. This case also involves the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, the relevant portion of which is reprinted at JA: 49.

STATEMENT OF THE CASE

I. Factual Summary

On the Elizabeth River in Norfolk, Virginia the Norfolk and Western Railway Company operates a coal loading terminal ("Lambert's Point"). The pri-

---

[2] The court issued no separate opinion, relying instead on its March, 1988 opinion in the consolidated appeals of *Schwalb v. Chesapeake & O. Ry.* and *McGlone v. Chesapeake & O. Ry.*, 235 Va. 27, 365 S.E.2d 742 (1988), reprinted at JA: 20. A Petition for a Writ of *Certiorari* in these consolidated cases was granted by this Court on February 21, 1989. 109 S. Ct. 1116 (No. 87-1979).

mary function of Lambert's Point is the export of coal, coke and general merchandise by vessels plying the navigable waters of this country and the world.[3] Coal arrives at Lambert's Point in railroad hopper cars, which are classified prior to loading in an area of the terminal called the "Barney Yard" or "hump yard"[4] for transfer to a particular vessel at a pre-scheduled loading time. Loading begins[5] when the coal car is released by brakemen in the Barney Yard to begin its roll to the pier. Continuing its passage toward the pier, the car is moved by a "pusher" through a thawing shed and halted over an area called the "Barney pit." Brakemen, located in this area, position the car and release the car from other cars in the pit in order to allow the car to go up to the dumper. A machine called a "Barney mule" pushes each car up to the dumpers, which are located at the land end of the pier. Positioned by a retarder[6] and embraced by the dumper's mechanical arms, the coal car is tipped upside down, allowing the cargo to fall onto conveyor belts to be transported without interruption

---

[3] Exhibits introduced below, including a plat and photographs of the Lambert's Point operation labeled to show certain relevant landmarks, are reproduced at JA: 169-174.

[4] This latter nickname refers to the slope of the yard and track towards the piers, which allows for the manual, non-mechanical movement of loaded rail cars toward the dumpers.

[5] The lower court concluded this based on the evidence below and to this time respondent has not disputed this. [JA: 35]

[6] The retarder is a mechanical device that stops the loaded coal car at the correct position on the dumper to permit the car to be held in place while being rotated 180°. The retarders located on the dumpers are structurally unique to the pier operation and are critical to the loading process. [JA: 145]

to the shiploaders, from which the coal drops into the hold of the waiting ship.

Pier 6[7] projects into the river due west; it is 1600 feet long and 88 feet wide. Located on the pier are two shiploaders that receive coal by way of the conveyor system running from the dumpers. The dumpers are located approximately 500 feet from a conveyor belt transfer building ["B-C" or Transfer Building], located at the land end of the pier. Barring mechanical problems, the coal moves continuously from the Barney Yard into the ship within a matter of minutes by means of the loading machines and gravity. Within 30 minutes after loading is completed, the vessel is expected to be away from the pier and on its journey.

Beginning in 1979, respondent was assigned to the Lambert's Point Motive Power-Piers department, which consists of machinists, electricians, operators (of dumpers, loaders, etc.) and line tender/helpers. Only Motive Power-Piers personnel operate and repair the ship-loading equipment. With the exception of deck foremen and clerical personnel, the only N&W workers allowed on the piers or ships are Motive Power-Piers personnel. This department is headquartered in a masonry building at the piers, located 225 feet east of the water near Pier 5 and 850 feet due south of Pier 6. Machinists, electricians, operators and line tender/helpers working from this building oper-

---

[7] There are two coal loading piers at Lambert's Point. Pier 5 is the older structure and is used infrequently at this time. Pier 6 was the structure being used at the time of the subject incident. Referring to the plat and photographs in the appendix, Pier 5 is the southern structure, Pier 6 the northern one. [JA: 170, 172]

ate, maintain and repair all the Lambert's Point loading equipment. [JA: 130]

Respondent's first duties as an employee at Lambert's Point included line tending (tying up ships at the pier) and helping the machinists.[8] By the time of his accident in 1985, respondent had been promoted to pier machinist. [JA: 185] According to respondent's supervisors, pier machinists devote over 95 percent of their work time repairing and maintaining the equipment directly involved in loading coal: the dumpers, the shiploaders out on the pier, and the conveyor belt system between the two. [JA: 141, 156, 159]

On the day of his accident, respondent was assigned to inspect, and repair if necessary, the retarders on the Pier 6 south dumper.[9] A line tender/helper was assigned to assist him. Upon inspection of the retarders respondent discovered excessive wear in a portion of the linkage, requiring the removal and replacement of parts attached to an air cylinder. The loading process was necessarily halted during the several hours respondent was repairing the retarder linkage. [JA: 160] Respondent injured his hand as he was reattaching an air cylinder to the linkage on the retarder. Respondent alleged that he was "hurried" by his supervisor to complete the task in order to allow the loading to resume.

---

[8] His job was "line tender/helper." The "helper" label indicates a pier electrician or pier machinist apprentice. [JA: 154]

[9] *See supra* note 6 and accompanying text (describing function of retarder).

II. Procedural History

Respondent brought an action in the Circuit Court of the City of Norfolk, Virginia, seeking damages under the FELA. Petitioner moved to dismiss the FELA action for lack of jurisdiction, contending that the LHWCA provided plaintiff's sole and exclusive remedy. 33 U.S.C. § 905(a). After an evidentiary hearing, the trial court sustained the petitioner's motion and dismissed the FELA action. Acknowledging that the duty of lower state courts "is not to make law but to interpret and follow the law as set forth by courts of higher dignity," Judge Waters found that respondent Goode was a maritime employee "involved in the essential elements of loading and unloading" as that phrase has been employed in numerous federal decisions applying the LHWCA status test. [JA: 37] Judge Waters addressed the conflict between the controlling federal decision, *Price v. Norfolk & Western Railway*, 618 F.2d 1059 (4th Cir. 1980), and an earlier Virginia Supreme Court decision, *White v. Norfolk & Western Railway*, 217 Va. 823, 232 S.E.2d 807, *cert. denied*, 434 U.S. 860 (1977). Expressing the belief that Goode would be found a maritime employee even under the narrower *White* analysis,[10] Judge Waters acknowledged nevertheless that "this case does involve a federal question, the federal authorities are therefore the more persuasive, and to the extent that *White* differs from significant federal decisions, the *White* court, in my opinion must yield." *See* Judge

---

[10] The Supreme Court of Virginia apparently did not consider this in entering its Order summarily reversing and remanding the case on the basis of its earlier decision. [JA: 46]

Waters' opinion at JA: 37-38.[11] The sole issue considered by the Supreme Court of Virginia on appeal was whether Goode was a statutory employee as defined by the LHWCA. Persisting in its adherence to the narrow standard established in its *White* decision, the Supreme Court of Virginia reversed and annulled the judgment of the Norfolk Circuit Court and remanded the case for trial on the merits as an FELA claim. The court issued no explanatory opinion to support its decree, merely referring instead to its opinion issued the previous month in *Schwalb v. Chesapeake & Ohio Railway*, and *McGlone v. Chesapeake & Ohio Railway*, 235 Va. 27, 365 S.E.2d 742 (1988).

SUMMARY OF THE ARGUMENT

Congress enacted the LHWCA in 1927 to provide federal compensation for injured employees working on navigable waters who were otherwise ineligible for state compensation awards. The disparities in coverage perpetuated by the 1927 scheme along with the advent of containerized cargo loading technology prompted Congress to amend the Act in 1972 and again in 1984. The 1972 Amendments significantly broadened the scope of LHWCA coverage by ex-

---

[11] Newport News Circuit Court Judge Smith, in *Schwalb v. Chesapeake & O. Ry.*, No. 8827 (Aug. 8, 1984) and Portsmouth Circuit Court Chief Judge Schlitz, in *McGlone v. Chesapeake & O. Ry.*, No. L84-327 (May 29, 1985) also chose to follow *Price* and the uniform federal authorities extending LHWCA coverage to pier employees, with Judge Schlitz noting that "*White* stands alone in contrast to the federal decisions . . . which have declined to follow *White* and have disagreed with its results." *See* Opinion of Judge Smith and Opinion of Chief Judge Schlitz. [JA: 28, 30] These rulings were also reversed by the Virginia Supreme Court on appeal. *See supra* note 2 and accompanying text.

panding the definition of the covered situs in 33 U.S.C. § 902(4) to include piers, terminals, and other areas customarily used for cargo loading; and by affirmatively describing the class of covered maritime employees, defined in 33 U.S.C. § 902(3), to include, for example, harbor workers and other persons "engaged in longshoring operations."[12] *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 261-264 (1977).

There are four inquiries which must be made in order to determine jurisdiction under the LHWCA. The first is whether the employer comes within the Act.

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. § 902(4).[13]

---

[12] Further amendment in 1984 refined the "maritime employee" definition in response to some administrative and judicial uncertainty about the intended scope of the act. Congress, however, left undisturbed the 1972 coverage language applicable to this case. *See infra* pp. 17-19 (discussing inference that legislative re-enactment implicitly adopts prior judicial and administrative interpretations). The 1984 version of § 902(3) appears at JA: 47; the prior version appears at JA: 48.

[13] Petitioner's status as maritime employer has never been questioned. *See, e.g., Price v. Norfolk & W. Ry.*, 618 F.2d 1059 (4th Cir. 1980).

The second inquiry, which is the subject of this appeal, is the "status" test. The employee must be engaged in "maritime employment" as defined by the Act to effect LHWCA jurisdiction.

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker. . . .

33 U.S.C. § 902(3).

The third inquiry is related to the status test. To be compensable under the Act the injury must be one "arising out of and in the course of employment." 33 U.S.C. § 902(2).[14]

The final inquiry is the issue of maritime "situs", defined as a location which is

> upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 903(a).[15]

---

[14] To make a *prima facie* case under the FELA the claimant must plead that injury arose out of or in the course of employment.

[15] The situs requirement was found to be satisfied by the trial court. [JA: 38-39]. The respondent never raised it as an issue in the appeal to the Supreme Court of Virginia nor was this issue raised in Goode's brief in opposition to the petition. The *Schwalb-McGlone* opinion did not address the situs requirement nor did

This Court has prescribed judicial standards, consistent with the legislative intent of the 1972 amendments, for determining whether a terminal worker is engaged in maritime employment (the so-called "status" test) for purposes of the LHWCA. For more than a decade, the lower federal courts and the Benefits Review Board, the administrative body that oversees LHWCA claims, have contributed additional insightful analyses while applying the status test in a variety of factual settings. It is too late in the development of the LHWCA status test for the Supreme Court of Virginia to have misapprehended the principles approved by this Court. By denying LHWCA status to respondent Goode, who was clearly a harbor worker engaged in an integral and essential part of the coal loading sequence, the Virginia Supreme Court has obviously repudiated controlling

---

the Order reversing this case. In *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979), this Court acknowledged the "broad geographic coverage" of the Act and the concern with occupation more than location. 444 U.S. at 78. The federal courts have found the requisite situs far more landward than in the present case. *See, e.g., Newport News Shipbuilding & Drydock v. Graham*, 573 F.2d 167 (4th Cir.) (submarine shop located 1200 feet from water and foundry 3000 feet from water), *cert. denied*, 439 U.S. 979 (1978); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978) (2600 feet from water); *Stockman v. John T. Clark & Son*, 539 F.2d 264 (1st Cir. 1976) (terminal two miles by road from vessel berths), *cert. denied*, 433 U.S. 908 (1977). The accident site's relationship to the water and piers as shown by the photos and plat cannot be ignored. "One picture may be clearer than a thousand words." *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 516 n.20 (5th Cir. 1980) (recognizing importance of aerial photos in determining situs), *cert. denied*, 452 U.S. 905 (1981). By necessary implication the Fourth Circuit conceded that the subject area was a covered situs in *Conti v. Norfolk & W. Ry.*, 566 F.2d 890 (4th Cir. 1977).

federal precedent. This unsanctioned autonomy clearly imperils the advancement of the simple, uniform standard of coverage envisioned by Congress and subjects all pierside workers, not only railroad employees, to the uncertainties of pursuing various and conflicting remedies for recovery.

ARGUMENT

I. Goode Is A Maritime Employee

Determination of a worker's status as a maritime employee within the terms of the LHWCA is controlled by principles established in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), as applied by the federal courts following *Caputo*'s guidance.

> We are directed by *Northeast Marine Terminal* to give effect to the remedial purpose of the Act by adopting a broad construction of the status requirement. . . .

Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 140 (9th Cir. 1978). In *Caputo*, the Court found that Blundo, who monitored the stripping of cargo from unloaded containers, was engaged in maritime employment because his job was "an integral part of the unloading process." 432 U.S. at 271. By finding coverage for Blundo, who was performing essentially clerical duties at a shoreside loading facility, the Court emphasized that the critical question in determining LHWCA status is the purpose of the work, not the type of work. The *Caputo* Court also acknowledged that the expansiveness of the 1972 amendments re-

quires a correspondingly expansive reading of the Act by the judiciary. *Id.* at 268.[16]

The Court reaffirmed this approach to the LHWCA status test in *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979). Again focusing on the nature of a worker's general job responsibility and its relation to the ship-loading process, the Court in *Pfeiffer* ruled that two pier workers were maritime employees because they were "engaged in intermediate steps of moving cargo between ship and land transportation." *Id.* at 83.[17] The *Pfeiffer* Court stressed that extending LHWCA coverage to workers involved in any portion of the cargo moving process would best effectuate the congressional goal of "a simple, uniform standard of coverage." *Id. Caputo* and *Pfeiffer* are credited with having created a "functional relationship" test for LHWCA status: if a job is functionally related to the movement of maritime cargo, it is maritime employment for the purpose of LHWCA coverage.

Following these authorities, the Court of Appeals for the Fourth Circuit found a railroad employee whose responsibilities included maintaining and repairing equipment and structures used in loading and unloading vessels to be engaged in maritime employ-

---

[16] More recently, in *Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297 (1983), the Court has emphasized that the Act is to be "liberally construed" and has reaffirmed that Congress intended the amended Act to "extend" coverage and protect "additional" workers. 459 U.S. at 315-16 (quoting S. Rep. No. 92-1125 at 1 (1972)).

[17] *Cf. Conti v. Norfolk & W. Ry.*, 566 F.2d 890 (4th Cir. 1977) (construing *Caputo* not to cover worker not integral part of unloading process unless job is of traditional maritime nature).

ment within the terms of the LHWCA.[18] This case is *Price v. Norfolk & Western Railway*, 618 F.2d 1059 (4th Cir. 1980), in which the court found that the employee, who was injured while painting a tower supporting the conveyor belt system used to transport grain to the holds of nearby vessels, was allowed to seek his remedy only under the LHWCA. To reach the conclusion that this worker was a maritime employee, the court reasoned that:

> (1) the equipment being maintained by the claimant was essential to the loading and unloading of vessels at the port; and
>
> (2) the maintenance and repair of longshoring machinery and equipment is as essential to the movement of maritime cargo as the actual loading and unloading of ships.

Id. at 1061. The *Price* court, 618 F.2d at 1062, "simply disagree[d] with" *White v. Norfolk & Western Railway*, 217 Va. 823, 232 S.E.2d 807, *cert. denied*, 434 U.S. 860 (1977), finding the reasoning in a Ben-

---

[18] Although railroad workers generally are allowed to seek damages for work-related injuries under the FELA, it is well settled that railroad company employees may be compensated only under the LHWCA if they are injured while engaged in maritime employment. *See Pennsylvania R.R. v. O'Rourke*, 344 U.S. 334 (1953); *Nogueira v. New York, N.H & H.R.R.*, 281 U.S. 128 (1930). *See also Caldwell v. Ogden Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980); *Freeman v. Norfolk & W. Ry.*, 596 F.2d 1205 (4th Cir. 1979). Congress has never amended either act to permit choice of coverage, or to exempt railroad employees from the LHWCA, despite over 50 years of case law construing the LHWCA to provide exclusive coverage for maritime railroad employees.

efits Review Board decision to be a better statement of the law:

> Merely because a waterfront mechanic is not directly involved in the actual loading or unloading of cargo does not remove him from the coverage of the amended Act. *The maintenance and repair of longshoring machinery and equipment is essential to the movement of maritime cargo* and, thus, such an employee's duties are included in the broad concept of maritime employment.

Bradshaw v. McCarthy, 3 BEN. REV. BD. SERV. (MB) 195, 198 (Jan. 26, 1976), *petition for review denied*, 547 F.2d 1161 (3d Cir.), *vacated and remanded*,433 U.S. 905 (1977),[19] *quoted in Price v. Norfolk & Western Railway*, 618 F.2d at 1061 (emphasis supplied).

In *Harmon v. Baltimore & Ohio Railroad*, 741 F.2d 1398 (D.C. Cir. 1984), the Court of Appeals for the D. C. Circuit reached the same conclusion with regard to a railroad carpenter who was injured while repairing a hopper through which coal passes during the loading process. Adopting the *Pfeiffer* standard of coverage for employees "engaged in intermediate steps of moving cargo," the *Harmon* court reasoned that, since coal-loading equipment is essential to the movement of maritime cargo from railcars to ships, "the repair and maintenance of that equipment must also be considered as an integral part in the loading and unloading of ships." 741 F.2d at 1403-04.

---

[19] This Court remanded the case to be decided in light of *Caputo*. The subsequent decision was not published and a petition for review was denied in *McCarthy v. Bradshaw*, 564 F.2d 89 (3d Cir. 1977).

Other circuits have similarly applied the functional relationship test derived from *Caputo* and *Pfeiffer*, in deciding that workers who maintain or repair equipment essential to loading vessels are maritime employees for LHWCA purposes.[20] Illustrative cases include *Sea-Land Services, Inc. v. Director, Office of Workers' Compensation Programs*, 685 F.2d 1121, 1123 (9th Cir. 1982) (repair and maintenance of equipment necessary to loading ships integral to process, thus "maritime employment" for LHWCA); *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 755-56 (5th Cir. 1981) (maintenance and repair of longshoring equipment and facilities, essential and indispensable step in shiploading process, constitutes "maritime employment" for LHWCA), *cert. denied*, 454 U.S. 1163 (1982); *Garvey Grain Co. v. Director, Office of Workers' Compensation Programs*, 639 F.2d 366, 370 (7th Cir. 1981) (repair and general maintenance of conveyors and other loading equipment integral part of loading process, conferring LHWCA status on worker performing these tasks); *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d

---

[20] Although this Court has never specifically addressed the issue, it has suggested in *dictum* that mechanics who maintain loading equipment are engaged in maritime employment. In *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985), the Court refused to extend LHWCA coverage to a welder working on a fixed off-shore drilling platform. In language important to this case, the Court pointedly remarked that the employee's "work had nothing to do with the loading or unloading process, nor [was] there any indication he was *even employed in the maintenance of equipment used in such tasks.*" 470 U.S. at 425 (emphasis supplied). Furthermore, this Court has held that the specific jobs listed in § 902(3) include only "a part of the larger group of activities that make up 'maritime employment'. . . ." *P.C. Pfeiffer Co. v. Ford*, 444 U.S. at 77 n.7.

30, 37 (1st Cir. 1980) (repair and maintenance of integrated shiploading equipment qualifies as maritime employment for LHWCA), *cert. denied*, 452 U.S. 938 (1981); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978) (gear lockerman who repaired and maintained stevedore equipment performed integral and essential part of longshoring operations).

Administrative decisions affording LHWCA coverage to maintenance mechanics have proliferated following the 1972 legislation. In some of these decisions coverage is premised on the same rationale as in *Caputo*, *Price* and *Harmon*: since the repair and maintenance of loading equipment is integral and essential to the movement of maritime cargo, employees who perform such work have the status of LHWCA employees. *See, e.g., Wuellet v. Scappoose Sand and Gravel Co.*, 15 BEN. REV. BD. SERV. (MB) 223(ALJ) (Dec. 29, 1982) (LHWCA coverage for mechanic injured while changing conveyor belt), *aff'd*, 18 BEN. REV. BD. SERV. (MB) 108 (Feb. 20, 1986); *Jackson v. Atlantic Container Corp.*, 15 BEN. REV. BD. SERV. (MB) 473 (Aug. 24, 1983) (LHWCA coverage for terminal mechanic who performed minor repairs and monthly maintenance on linkspan); *Ganish v. Sea-Land Service, Inc.*, 13 BEN. REV. BD. SERV. (MB) 419 (April 28, 1981) (LHWCA coverage for terminal mechanic who regularly maintained and repaired equipment used to move cargo containers and loading personnel), *aff'd sub nom. Sea-Land Services, Inc. v. Director, Office of Workers' Compensation Programs*, 685 F.2d 1121 (9th Cir. 1982); *Lewis v. Pittston Stevedoring Corp.*, 7 BEN. REV. BD. SERV. (MB) 691 (Feb. 10, 1978) (LHWCA coverage for terminal garage mechanic who regularly repaired and maintained cargo

handling tools and equipment). In an alternative approach, the Benefits Review Board has construed "harbor workers" to encompass mechanics who repair the cargo loading equipment installed at a maritime terminal. *See Stewart v. Brown & Root, Inc.*, 7 BEN. REV. BD. SERV. (MB) 356, 365 (Jan. 12, 1978) ("harbor workers" defined to include "at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships)" for purposes of the LHWCA status test). These administrative decisions are not cited as meriting special deference by federal courts, *cf. Kelaita v. Director, Office of Workers' Compensation Programs*, 799 F.2d 1308, 1310 (9th Cir. 1986);[21] rather they exemplify the consistent pattern of judicial and administrative decisions, of which Congress would have been aware in 1984, in which terminal mechanics who repair loading equipment are deemed to be maritime employees under § 902(3).

Against this background it is noteworthy that in 1980 a proposal to expressly exclude workers engaged in "maintenance, or repair of gear or equipment" died in Committee. *See Herb's Welding v. Gray*, 470 U.S. 414, 423 n.9 (1985). It is also highly significant that the 98th Congress did not exclude maintenance mechanics (or railroad employees) when it otherwise restricted the scope of § 902(3) in the 1984 amendments. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (Congress presumed aware of particular interpretations of

---

[21] However, administrative findings are controlling if supported by the evidence. *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d at 140 n.2.

legislative provisions when it reenacts statutory language without change).

> [W]e have recognized that Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication "that Congress at least acquiesces in, and apparently affirms, that [interpretation]."

Monessen Southwestern Railway v. Morgan, 486 U.S. ___, ___, 108 S. Ct. 1837, 1843-44 (1988) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979)). The conclusion that Congress implicitly adopted these prior judicial and administrative interpretations is more compelling when the "status" restrictions that *were* added by the 1984 amendments are considered. After LHWCA benefits had been awarded in the early 1980's to security workers, museum employees, restaurant employees, and workers repairing recreational vessels under sixty-five feet in length, it is not a coincidence that Congress excluded some of these workers from coverage in the 1984 version of §§ 902(3)(A),(B), and (F). *Cf., e.g., McCarthy v. The Bark Peking*, 716 F.2d 130 (2d Cir. 1983) (according LHWCA status to worker painting museum vessel), *cert. denied*, 465 U.S. 1078 (1984);[22] *Arbeeny v. McRoberts Protective Agency*, 642 F.2d 672 (2d Cir.) (according LHWCA status to pier security guards), *cert. denied*, 454 U.S. 836 (1981);[23] *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994 (5th Cir.) (according LHWCA status to marine carpenter who re-

---

[22] 33 U.S.C. § 902(3)(B) now excludes workers employed by museums. [JA: 47]

[23] 33 U.S.C. § 902(3)(A) now excludes security personnel who perform exclusively *office* security work. *See id.*

paired recreational vessels up to sixty feet in length), *modified on other grounds*, 657 F.2d 665 (5th Cir. 1981);[24] *Cefaratti v. Mike Fink, Inc.*, 83-LHWCA-1992 (ALJ) (May 2, 1984) (according LHWCA status to restaurant worker), *aff'd*, 17 BEN. REV. BD. SERV. (MB) 95 (Feb. 27, 1985).[25] However, the legislative history explaining the purpose of the 1984 amendments to § 902(3) expressly states:

> [I]t is the intention of the Committee neither to expand nor to contract the current coverage of the Longshore Act. The Committee concurs with the view of the Senate Committee on Labor and Human Resources in this regard, which stated "... with the committee making only *limited changes* to [these sections] of the act, it is obvious that *a large body of decisional law relative to traditional maritime employers and harbor workers remains undisturbed.*"

H.R. Rep. No. 570, Part I, 98th Cong., 2d Sess. 5, *reprinted in* 1984 U.S. Code Cong. and Ad. News 2734, 2738 (1984) (emphasis supplied). To paraphrase *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980): where Congress explicitly enumerates certain exceptions to coverage, additional exceptions are not to be implied.

In 1977, without the guidance of *Caputo* and *Pfeiffer*, the Supreme Court of Virginia held that a railroad mechanic who maintained and repaired loading

---

[24] 33 U.S.C. § 902(3)(F) now excludes workers who repair recreational vessels under 65 feet in length. *See id.*

[25] 33 U.S.C. § 902(3)(B) now excludes workers employed by restaurants. *See id.*

equipment at the Norfolk coal piers was not a LHWCA employee because he was "not *directly involved* in the loading of coal." *White v. Norfolk & Western Railway*, 217 Va. 823, 833, 232 S.E.2d 807, 813, *cert. denied*, 434 U.S. 860 (1977) (emphasis in original). Focusing on the fact that plaintiff was "not actually handling any cargo, either manually or mechanically," *id.*, and borrowing language from *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 961 (9th Cir.1975) ("realistically significant relationship to 'traditional maritime activity' "), *cert. denied*, 429 U.S. 868 (1976)[26] and *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 539 (5th Cir. 1976) ("directly involved"), *vacated and remanded*, 433 U.S. 904 (1977), the *White* court found that the plaintiff was outside the scope of the Act because he was "only *maintaining* the electrical devices on the shore and attached to the pier, work which is not the traditional

---

[26] The *Weyerhaeuser* opinion is inapposite authority for analyzing the status of workers at a commercial loading pier: the *Weyerhaeuser* plaintiff was a pondman injured while working on a sawmill log pond, not a repairman maintaining shiploading equipment beside a deep water pier. *See* 528 F.2d at 961 (pondman's work not maritime employment in traditional sense; no "realistically significant relationship" to traditional maritime activity involving navigation and commerce on navigable waters). As pointed out in *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1049 (5th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983), *Weyerhaeuser* formulated its "significant relationship" status test from language in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), which addressed the separate question of federal admiralty jurisdiction in claims arising from aviation accidents. The *Weyerhaeuser* holding does not speak persuasively as to the intended reach of federal jurisdiction in the context of maritime employment compensation.

work of a ship's service employee."[27] 217 Va. at 833, 232 S.E.2d at 813 (emphasis in original). In the decade following *White*, not one reported court opinion has acknowledged *White* as persuasive authority. Both the Ninth and Fifth Circuits, relied on by the *White* court, have subsequently held that workers who repair and maintain shiploading equipment are within the scope of the LHWCA. *See, e.g., Sea-Land Services, Inc.*; *Hullinghorst Industries, Inc.*; *Brady-Hamilton Stevedore Co. v. Herron.*

Given the tenuous underpinnings of *White* and the subsequent clarification of the LHWCA status test in the federal fora, the lower courts in Virginia had concluded that they were no longer bound under *stare decisis* to follow *White*. *See, e.g.*, Opinion of Judge

---

[27] To highlight the confusion of the Virginia court's reliance upon *White* one need only note that line tending was conceded by the Virginia Supreme Court to be within the definition of "maritime employment." 217 Va. at 830, 232 S.E.2d at 811. Line tender/helpers are in the same department as respondent Goode (Motive Power-Piers). Goode had also worked as a line tender/helper, and a line tender/helper was assisting Goode when he was injured. [JA: 167]

Another case, infrequently followed, which resorts to the "traditional maritime activity" analysis is *Conti v. Norfolk & W. Ry.*, 566 F.2d 890 (4th Cir. 1977), decided immediately after *Caputo*. *See supra* note 17. *Conti* involved the brakemen who release the cars in the Lambert's Point Barney Yard and uncouple the cars at the Barney Pit as described *supra* p. 3. The Fourth Circuit applied a "traditional railroading vs. traditional maritime tasks" test to determine coverage. *See* 566 F.2d at 895 (workers engaged in unloading train, not loading vessel). This analysis was not even mentioned in the *Price* opinion and has not been adhered to in the Fourth Circuit. *See Harmon v. Baltimore & O.R.R.*, 741 F.2d at 1404 (Fourth Circuit has "moved away" from *Conti* analysis).

Stephens in *Turnista v. Chesapeake & Ohio Railway*, No. 8690-WS (Newport News Cir. Ct. May 21, 1984), reprinted in the appendix to the petition for *certiorari* at pages 49A, 61A-62A (respectfully declining to follow *White* and concluding *Price* is controlling); Opinion of Judge Waters in *Goode*, JA: 37-38 (federal authorities "more persuasive" on issue of application of federal statute); Opinion of Judge Smith in *Schwalb*, JA: 29 (relying on interpretations of LHWCA expressed by U.S. Supreme Court); and Opinion of Judge Schlitz in *McGlone*, JA: 33 (conflict between state and federal authority must be resolved in favor of latter). Doubtless Virginia's trial judges were surprised when the Supreme Court of Virginia used its review of the *Schwalb* and *McGlone* appeals not to reject or distinguish but to reaffirm the vitality of its *White* rationale.

In its March 4, 1988 opinion, the *Schwalb-McGlone* court opined that Congress did not intend the 1972 amendments to "have such pervasive and preclusive effects" as had been attributed to them by, for example, the Fourth Circuit Court of Appeals in *Price*. 235 Va. at 32, 365 S.E.2d at 744. Rejecting again the functional relationship formula that has been the linchpin of the LHWCA status test,[28] *id.* at 31, 365 S.E.2d at 744, the Supreme Court of Virginia regressed to an illogical demarcation of coverage where "workers who perform purely clerical tasks" are indistinguishable from workers who perform repairs and maintenance "such as painting" (a clear reference to *Price*), *id.* at 33, 365 S.E.2d at 745, both groups

---

[28] *See supra* p. 12-17 (*Caputo* and *Pfeiffer* created functional relationship test for LHWCA status, applied by judicial and administrative tribunals).

failing to fulfill the Virginia Supreme Court's unjustified requirements for LHWCA coverage. The court recast its LHWCA status test in terms of an "essential elements" standard, which it described as "more nearly akin to the 'significant relationship' standard . . . adopted in *White* than the 'overall process' construction invoked by the defendant." *Id.* Thus clothed in semantics, the court ruled that Schwalb and McGlone were non-covered workers, "perform[ing] purely housekeeping and janitorial tasks." *Id.*[29]

Under any of the federal or administrative authorities construing § 902(3) since the 1972 amendments, respondent Goode would clearly be a maritime employee, either as a harbor worker or as a person engaged in longshoring operations. The Virginia Supreme Court's memorandum decision in *Goode*, issued one month after the *Schwalb-McGlone* decision, evinces the state court's unyielding refusal to analyze the functional relationship of specific pierside jobs to the loading process, and repeats the court's apparent intention to exclude all but those labeled longshore-

---

[29] Both Schwalb and McGlone were pierside mechanical workers at a coal loading maritime terminal similar to Lambert's Point. Their primary job responsibility was to ensure the continuous functioning of coal loading equipment by retrieving accumulations of coal from around and beneath the loading equipment and conveyor belts. Schwalb was injured on her way to perform a thorough cleaning of the trunnion rollers that rotate the dumper; McGlone was injured while blowing trapped coal from beneath the moving conveyor belt with an air hose. Even the Virginia Supreme Court acknowledged that failure to remove these coal accumulations would eventually cause malfunctions and interruptions in the coal loading process. 235 Va. at 29, 365 S.E.2d at 743. [JA: 21]

men and shipbuilders from LHWCA benefits.[20] The Virginia Supreme Court now appears entrenched in its defiant disavowal of controlling federal precedent.

II. The Virginia Supreme Court Decision Offends The Congressional Goal Of A Uniform Standard

Disdaining the federal courts' uniform interpretation of the LHWCA status test, the Virginia Supreme Court has ignored the congressional mandate to apply a "simple, uniform standard of coverage," and the instruction of *Caputo*, *Pfeiffer*, and their progeny. Maintaining uniformity in the application of the LHWCA is at least as important today as it was when the Court initially undertook to construe the LHWCA and its relationship with other compensation plans.

It is clear that railroad employees are eligible for coverage under the LHWCA and that such coverage is exclusive of any potential FELA recovery. *See supra* note 18 and cases cited therein. Under the LHWCA both parties are free of the costs (particularly attorney's fees) and the delay, as well as the uncertainty of result, of litigation. As the United States pointed out in its *amicus curiae* brief, numerous other potential claimants may be adversely affected by a failure to provide coverage, thus

---

[20] The Virginia Supreme Court's rationale would also bar from LHWCA coverage workers who maintain or repair shipbuilding or ship repairing equipment. This position also conflicts directly with the Fourth Circuit's holding in *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167 (4th Cir.), *cert. denied*, 439 U.S. 979 (1978), and ignores this Court's repeated observation that the maritime occupations specifically listed in § 902(3) were not intended to be exclusive. *See Herb's Welding*, 470 U.S. at 421 n.9; *Pfeiffer*, 444 U.S. at 77-78 n.7.

frustrating the clear intention of Congress to provide uniform relief to all those, not otherwise excluded, engaged in these activities. *See* Brief For The United States As *Amicus Curiae* (in support of petition) at 7 n.6.

Decisions of the United States Supreme Court are final and authoritative with respect to the construction and application of federal statutes. *Monessen Southwestern Railway v. Morgan*, 486 U.S. ___, ___, 108 S. Ct. 1837, 1842-44 (1988). Absent clear words to the contrary, construction of the language in a federal statute is a federal question. *Western Air Lines v. Board of Equalization*, 480 U.S. 123, 129 (1987). A state court is not free to follow its own dictates or precedent in areas of federal substantive law in the face of federal authority to the contrary. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942). The Supreme Court of Virginia appears not to acknowledge this as the law. As this Court admonished in an earlier demonstration of independence by the Supreme Court of Virginia:

> [T]he vice of this position is that, in following its own prior decision, the court ignored the decision of this court to the contrary. This lawfully it could not do, the question, as we have shown, being a federal question to be determined by the application of federal law. The determination by this court of that question is binding upon the state courts, and must be followed, any state law, decision, or rule to the contrary notwithstanding.

Chesapeake & Ohio Railway v. Martin, 283 U.S. 209, 220-221 (1931).

The mischief created by the aberrant state court decisions in the case at bar and the *Schwalb* and *McGlone* cases will not be limited to the parties in this action. The judges in Virginia's trial courts, as well as administrative law judges hearing Virginia cases, must now immediately confront the dilemma of divergent authority within the state on the threshold question of jurisdiction. Employers in Virginia now face uncertainty as to their responsibility to secure compensation under the LHWCA.

The brief filed in support of the petition by *amici curiae* Association of American Railroads and National Association of Railroad Trial Counsel pointed out many practical problems engendered by the lack of uniformity in the application of coverage. They include, but are not limited to, the following:

A) Mandatory notice deadlines under LHWCA, not under FELA;

B) Adversarial nature of FELA litigation requires immediate, extensive claim investigation, LHWCA does not;

C) Potential of litigation in FELA cases makes health care professionals less likely to provide necessary services voluntarily;

D) Potential penalties to employer for failure to secure immediate LHWCA compensation for employee while interim disability benefits are available to employee through application to Railroad Retirement Board; and

E) Problems with effective negotiation and appropriate resolution of employee injury claims in an economic and expeditious manner.[31]

See Brief of the Association of American Railroads and National Association of Railroad Trial Counsel (in support of petition) at 8-11.

An indirect consequence of the Virginia Supreme Court decision will be "forum shopping" by, for example, pierside railroad workers in other states who seek to avoid the exclusive jurisdiction of the LHWCA. Due to the vagaries of Virginia's venue statute, a resident of any state can bring an action in Virginia against an employer that does business in the state of Virginia; the action is not vulnerable to dismissal or transfer even if the plaintiff and all witnesses reside in another state and the accident occurred outside Virginia. Va. Code § 8.01-265 (1950).[32]

---

[31] Another hindrance to effective resolution of these conflicting sources of recovery is the "two bites at the apple" doctrine established in *Freeman v. Norfolk & W. Ry.*, 596 F.2d 1205, 1208 (4th Cir. 1979). The *Freeman* court concluded that a railroad employee could secure LHWCA compensation without prejudice (other than offset) to a subsequent FELA action for the same injury. Despite criticism in other courts, the principle still applies in this Circuit. *Cf. Caldwell v. Ogden Sea Transport, Inc.*, 618 F.2d 1037, 1053 (4th Cir. 1980) (Widener, J. concurring and dissenting) (LHWCA claimant working for railroad has "best of both worlds"). In selective "deference" to federal authority the Supreme Court of Virginia *did* acknowledge the viability of this principle. *Schwalb-McGlone*, 235 Va. at 34 n.2., 365 S.E.2d at 745 n.2. [JA: 27]

[32] The constitutionality, both under the U.S. and Virginia Constitutions, of this statute is before the Supreme Court of Virginia in *Seaboard System R.R. v. Caldwell*, No. 870490, *appeal granted* (Va. Sup. Ct. Mar. 22, 1988). Oral argument was heard on April 19, 1989.

If the *Goode* decision stands uncorrected, there is little doubt that Virginia courts will soon be inundated by foreign FELA actions, brought by maritime plaintiffs escaping the federal and state courts elsewhere that adhere to the federal standard. *See* Brief For The United States As *Amicus Curiae* at 18. This is hardly the result Congress intended when it amended the LHWCA to establish a simple, uniform standard of coverage.

To allow the Virginia Supreme Court decision to stand would frustrate the spirit and purpose of the LHWCA, create a favored class of maritime employees, perpetuate a dichotomous approach to the LHWCA status test, allow state courts on an issue of federal law intentionally to ignore federal cases to the contrary and burden the courts with unnecessary litigation.

CONCLUSION

For the above reasons, petitioner Norfolk and Western Railway Company respectfully submits that the judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

EDWARD L. OAST, JR.
Counsel of Record
WILLIAM T. PRINCE
JOHN Y. RICHARDSON, JR.
JOAN F. MARTIN
WILLIAMS, WORRELL, KELLY,
GREER & FRANK, P.C.
600 Crestar Bank Building
Norfolk, Virginia 23510
804-624-2600

Attorneys for Petitioner
Norfolk and Western
Railway Company